

Burden's on U! The Impact of the *Fisher v. University of Texas at Austin* Decision on K–16 Admissions Policies

David H.K. Nguyen

Abstract

Using race as a factor in admissions policies was contested in *Fisher v. University of Texas at Austin*. Although the U.S. Supreme Court firmly held in *Grutter v. Bollinger* that race can be considered among many factors in admitting students, the recent decision in *Fisher* has posed many questions and challenges for institutions of higher education. It is clear that the Supreme Court has made it more challenging for institutions to advance institutional diversity. This article examines the ruling in *Fisher* and how it impacts admissions in K–16 education.

Keywords

Admissions, Strict scrutiny, Race and ethnicity

This is the author's manuscript of the article published in final edited form as:

Nguyen, D. H. K. (2014). Burden's on U! The Impact of the *Fisher v. University of Texas at Austin* Decision on K–16 Admissions Policies. *The Clearing House: A Journal of Educational Strategies, Issues and Ideas*, 87(3), 97–101.
<https://doi.org/10.1080/00098655.2014.891899>

Introduction

Institutions of higher education waited anxiously to see if the U.S. Supreme Court would overturn race-conscious admissions in *Fisher v. University of Texas at Austin* (133 S. Ct. 2411 [2013]), a case where a white student claimed she was denied admission because of her race. The Court affirmed that diversity in higher education is a compelling state interest, but it ruled that the Fifth Circuit Court of Appeals did not properly review the university's admissions process under the strict scrutiny standard. The lower court erred when it presumed the university acted in good faith, ensuring narrow tailoring, and placed the burden to rebut on *Fisher* (*Fisher v. University of Texas at Austin*, 645 F. Supp. 2d 587 [W.D. Tex. 2009]). Justice Kennedy argued that under *Grutter v. Bollinger* (539 U.S. 306 [2013]), the latest higher education affirmative action case, the burden is on the university, not the complainant, to show that its admissions program is narrowly tailored to achieve the benefits of diversity (*Fisher* 2013).

In order to understand the implications of this decision, this article briefly provides a background on the *Fisher* case and reviews prior race-conscious admissions decisions. It also discusses the strict scrutiny standard of judicial review and how the shifted burden will impact the final outcome in the lower court. This article then expands on the implications on higher education and K–12 schools.

Background on the Equal Protection Clause and Prior Race-conscious Admissions Cases

The Equal Protection Clause of the Fourteenth Amendment states that “no State shall. . . deny to any person within its jurisdiction the equal protection of the laws.” Those who claim to have been denied admission to a college or university because of racial discrimination have argued violation of the Equal Protection Clause, and, as a result, the courts employed strict scrutiny when they decided whether the University of Texas at Austin's admissions policy was constitutional because race was at issue. *Strict scrutiny*, the most difficult level of judicial review for courts to satisfy, requires the government to show that it treats people differently because of a compelling state interest and that its treatment is narrowly tailored (Rotunda and Nowak 2010). The Supreme Court found that the university satisfied the first prong but could not rule on the second prong because the lower courts did not properly analyze it under strict scrutiny (*Fisher* 2013).

Prior decisions have set the stage to address race in university admissions. *Regents of the University of California v. Bakke* (438 U.S. 265 [1978]) concentrated on the consideration of race on the University of California Davis Medical School's admissions applications. Allan Bakke, a white male rejected twice by the medical school, argued that the medical school accepted less-qualified racial minority applicants by strictly setting aside 16 out of 100 seats for disadvantaged racial minority students, and that he was denied admission because of his race. The U.S. Supreme Court ruled that the medical school could not set aside a predetermined number of admissions only for minorities. However, Justice Powell noted that diversity in higher education is a compelling state interest, and race and ethnicity are important factors along with other qualifications and characteristics to be considered in an application. However, it was still unclear to what extent race could be used.

Grutter and *Gratz v. Bollinger* (539 U.S. 244 [2003]), both issued on the same day, reinforced the finding in *Bakke* and allowed the review of many qualifications, including race, among grades and test scores, letters of recommendation, undergraduate institution, personal statement, and so on. In *Grutter*, the University of Michigan Law School was permitted to use race holistically in their admissions review. The *Grutter* Court stated that it is not necessary to attempt the “exhaustion of every conceivable race-

neutral alternative” before a race-conscious policy is implemented, but it is important that universities consider race-neutral plans in good faith (340). This approach to admitting students survived the strict scrutiny test.

In *Gratz*, however, the Court struck down the University of Michigan undergraduate admissions program because it allotted an automatic 20 points to every applicant from an “underrepresented minority” group (250–60). This was not a holistic approach and was not narrowly tailored. Programs cannot include a formulaic quota system that protects certain applicants from competition from others based on race (*Grutter*, 327). With these two decisions, the Supreme Court affirmed that having a diverse student body is a compelling interest.

Fisher v. University of Texas at Austin

Plaintiff Abigail Fisher claimed that she was not admitted to the University of Texas at Austin in 2008 as a result of her race and that the university violated her rights to equal protection. The University of Texas at Austin admitted students through a two-step process: first, through Texas's Top Ten Percent Law, which granted automatic admission to any public college or university in Texas to those who graduate in the top 10 percent of their Texas high school class (Texas Education Code Annotated Sec. 51.803, 2009), and second, a *Grutter*-based approach explicitly considering race as one of many “plus factors” of a candidate's characteristics.

The Top Ten Percent Law, passed in 1997, was in response to a decrease in minority student enrollment as a result of *Hopwood v. Texas* (78 F.3d 932 [5th Cir. 1996]), a Fifth Circuit Court of Appeals case where several white students challenged the race-conscious admissions policies at a Texas law school. Oddly, the bill also suggests that universities should utilize a *Grutter*-based approach and consider a variety of other factors in admissions decisions for those not within the top 10 percent of their graduating class. However, race was not one of the factors considered until *Grutter*, but socioeconomic status, bilingual proficiency, and first-generation college student status were used.

Since the university used the *Grutter*-based race-conscious admissions process in addition to admitting students through the Texas-legislated Top Ten Percent Law, Fisher claimed it was in violation of the Equal Protection Clause (*Fisher* 2009). The U.S. District Court found that the university's policy was constitutional in a summary judgment. The Fifth Circuit Court of Appeals affirmed the District Court and found that the policy was not similar to an illegal quota (*Fisher v. University of Texas at Austin*, 631 F.3d 213 [5th Cir. 2011]). The Court of Appeals ruled that *Grutter* permitted substantial deference to the university to determine the diversity benefits that serve as a compelling state interest and to decide whether its admissions plan is narrowly tailored as long as it did so in good faith. As such, the Court of Appeals found that the university considered race as one of many characteristics in an application and the admissions plan was constitutional.

The U.S. Supreme Court held 7–1, vacating the lower court's decision and remanding it back to the Court of Appeals because it failed to properly apply strict scrutiny. The *Fisher* (2013) Court reaffirmed the constitutionality of race-conscious admissions, stating that “considering racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body” is permissible (2417). However, the Supreme Court found that the Court of Appeals did not apply strict scrutiny in its strictest form. Justice Powell in *Bakke* stated that “the university [must] demonstrate with clarity that its purpose or interest is both

constitutionally permissible and substantial, and that its use of the classification is necessary” to accomplish its purpose (305).

The *Fisher* (2013) Court agreed that the university has the knowledge and understanding to shape how diversity would best benefit its students, but the lower court improperly deferred to the university on the plan's implementation. Justice Kennedy stressed that no deference is permitted: “There must be a further judicial determination that the admission process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored” (2411). This would have required the Court of Appeals to carefully examine the admissions plan to determine if the plan was necessary to accomplish its purpose with no reasonable race-neutral alternative. The Court of Appeals specifically stated that it was “ill-equipped” to conduct a narrow tailoring examination of the plan so it reviewed whether the university made a good faith effort to consider race-neutral alternatives (*Fisher* 2011, 231).

Fisher (2013) did not overrule the use of race-conscious admissions policies, but concurrences from Justices Scalia and Thomas illustrate their support for that potential, clearly stating that the use of racial classifications in admissions decisions is akin to unconstitutional racial discrimination and that “the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest” (2413). Justice Thomas contends that any potential benefits from diversity are extremely outweighed by admissions policies that discriminate racially.

Justice Ginsburg dissented that the judicial review was proper and the plan's use of race as a factor continues to serve an important purpose to increase the educational benefits of diversity. Moreover, she posited that stated race-neutral policies, such as Texas's Top Ten Percent Law, that claim to be nondiscriminatory alternatives clearly take race into account, and therefore are not race neutral. For example, this Texas law was drafted in response to *Hopwood* and the continued de facto segregation in Texas neighborhoods and schools, and “[i]t is race consciousness, not blindness to race that drives such plans” (*Fisher* 2013, 2433). As a result, she stressed that it is preferable to continue to consider race as a factor in admissions, since alternatives to achieve diversity are neither as effective nor, in fact, race neutral.

Strict Scrutiny and the University’s Burden

Strict scrutiny is the most demanding judicial review U.S. courts apply. Courts use it to analyze whether a government action violates a fundamental right or discriminates based on a suspect classification such as race or national origin. The demanding requirements that a government action must be based on a “compelling interest” and be “narrowly tailored” are ways for the judicial system to make it challenging for government action to unfairly discriminate or deprive citizens of their basic rights. These government actions must accomplish a critical purpose through the least restrictive method.

In *Fisher* (2013), the Supreme Court reiterated that racial classifications similar to those used in affirmative action admissions policies must pass strict scrutiny. Similar to both *Grutter* and *Bakke*, *Fisher* (2013) deferred to the “educational judgment” of university administrators when determining whether student body diversity is a compelling governmental interest. Interestingly, the *Fisher* (2013) Court also hinted that it might have overturned *Bakke* and *Grutter*, allowing this deference to school administrators’ educational expertise to determine benefits of diversity, but the plaintiff did not request

the Court to answer this question (2419). Perhaps if *Fisher* did, the Court would have overturned *Bakke* and *Grutter*.

The Court instead concentrated on the deference of the Court of Appeals to the educational expertise of the university and its good faith when applying the narrow tailoring prong of the strict scrutiny test. The *Fisher* (2013) Court stressed that “the reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. . .; strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice” (2420). The Court of Appeals failed to follow *Grutter*'s strict scrutiny requirement because it deferred to the judgment of school administrators and presumed that they acted in good faith when they designed their admissions policies. The Court itself must have determined whether the admissions practices were narrowly tailored to meet diversity goals.

This Supreme Court ruling places an added burden on universities to prove that there are no other reasonable race-neutral alternatives. On remand, as Justice Ginsburg suggested in her dissent that the Court of Appeals could still find that the University of Texas's policies were narrowly tailored through its careful reexamination of the university's policies (*Fisher* 2013). Ginsburg disagreed with the majority and thought the lower court's “thorough opinions” had applied strict scrutiny adequately. However, in order to satisfy the Supreme Court and the outlined strict scrutiny standard, the lower court may require the university to present evidence and expert testimony on how the admissions plan is narrowly tailored, or it may merely clarify in its judgment how it finds that the plan is narrowly tailored through its strict judicial review.

After another round at the Fifth Circuit, this case could again end up at the Supreme Court. In the meantime, universities that use race-conscious admissions policies may wonder how they can ensure that their plans satisfy the rigorous strict scrutiny requirements. The use of institutional and social science research could assist to demonstrate that the affirmative action plan is narrowly tailored. Social science research has been heavily used by the Supreme Court in prior affirmative action cases to illustrate why diversity should continue to be a compelling state interest (Eckes, Nguyen, and Ulm 2013). If universities take an approach that relies on an empirical basis, it may satisfy that the plan is narrowly tailored (Cunningham, Loury, and Skrentny 2002). The use of social science research could produce sufficient evidence that admissions plans are narrowly tailored. Specifically, universities could use data to demonstrate how race-neutral policies are ineffective. What kind of data and evidence should be presented to the court remains a big question. There is no doubt that universities have an uphill battle to justify the use of race in their admissions.

Implications for Higher Education

The *Fisher* decision now puts higher education institutions in limbo regarding their admissions policies. It is clear that diversity is a compelling state interest, but colleges and universities remain unsure how their policies need to be narrowly tailored, since the Supreme Court did not exactly spell it out and left this task to the Fifth Circuit. In the meantime, this speculation opens up colleges and universities to litigation against denied applicants questioning whether their denial was due to unconstitutional discrimination. Institutions will now have to prove that other race-neutral alternatives cannot achieve its education benefit of diversity. Enrollment and other institutional research data will be essential to show that an institution has explored race-neutral plans but that the current implementation allows the

intended amount of racial diversity within its broader diversity goals. Documentation of internal policy reviews will be critical when defending it. In addition, institutions will need to continue collecting institutional data and periodically reviewing it to evaluate whether the need persists. Race-conscious admissions may have survived in *Fisher*, but it definitely places added burdens on colleges and universities.

Although the Equal Protection Clause does not apply to private universities because there is no government action involved, those that receive federal funds must not discriminate based on Title VI of the Civil Rights Act of 1964. The vast majority of private colleges and universities receive federal funds. Thirty-seven highly selective private universities supported the University of Texas in the *Fisher* case, stating that Title VI has an identical application to public and private institutions (Brief for Amherst College et al. as Amici Curiae Supporting Respondent, *Fisher v. University of Texas at Austin*, 2013; see: <http://www.utexas.edu/vp/irla/Documents/ACR%20Amherst%20et.%20al.pdf>). To illustrate, in 1996 private colleges and universities were affected by the Fifth Circuit's decision in *Hopwood*, which banned race-conscious admissions policies in Texas, Louisiana, and Mississippi (those states in the Fifth Circuit). If *Grutter* had been overturned in *Fisher*, private institutions would be forced to assemble a diverse class through race-neutral policies. Their amicus brief argued that these “alternatives” are “impracticable and illusory for smaller institutions” (Brief for Amherst College, 2). Not permitting race-conscious admissions would have a dramatic effect on these selective universities that have invested in recruiting and admitting diverse students.

Implications for K-12 Education

Besides *Bakke*, *Grutter*, and *Gratz*, the *Fisher* Court also followed its reasoning in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1 (PICS)* (551 U.S. 701 [2007]). While the previous cases focused on admissions in higher education, *PICS* dealt with student assignments designed to diversify the K–12 public schools in Seattle and Louisville. In *PICS* both plaintiffs claimed violations of their rights to equal protection because of student assignments that took into account students' racial identities. The students were denied placements in their preferred public schools because of districts' use of race in order to achieve greater racial balance among their schools. The Ninth Circuit (Seattle) and the Sixth Circuit (Louisville) courts ruled that the districts' student assignment plans were narrowly tailored to meet a compelling interest in racial diversity (*Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162 [9th Cir. 2005]; *McFarland v. Jefferson County Public Schools*, 416 F.3d 513 [6th Cir. 2005]).

The Supreme Court disagreed. It reversed and remanded the cases because the school districts did not consider race-neutral alternatives and their assignment plans were not narrowly tailored since race was *the* deciding factor, not one of many factors. The race-based student assignment plans were unconstitutional (*PICS* 2007). Furthermore, the Court found that remedying de jure school segregation was not a compelling interest and relying only on race was too limited a notion of diversity. However, the dissenting Justices stated that they believed there is a compelling state interest for public school districts to enhance diversity and reduce racial isolation, but that maybe there are less discriminatory methods to achieve these goals. *Fisher* (2013) aligns with *PICS* by reaffirming the notion that public institutions must consider workable race-neutral plans to achieve diversity among students, and that any admissions policies that consider race must be narrowly tailored.

In 2011 the U.S. Department of Education's Office for Civil Rights issued guidance for K–12 public schools to explain the use of racial considerations to enhance diversity that will be consistent with *PICS* (U.S. Department of Education, Office for Civil Rights 2011). With regard to the *Fisher* ruling, this guidance still applies, although it may be challenging for K–12 schools to craft narrowly tailored race-conscious policies that would withstand strict legal scrutiny. The guidance emphasizes the importance of minimizing racial isolation and the benefits of diversity in public schools, but it echoed *PICS* and now *Fisher* in that schools must consider race-neutral alternatives before using racial classifications in student placement, and race cannot be the defining weight for purposes of placement or admissions. Similar to previously mentioned suggestions for colleges and universities, the Department of Education's guidance suggested that K–12 school districts' periodically review their diversity initiatives to ensure that processes and policies remain constitutionally sound. Whether *Fisher* will result in additional litigation to K–12 diversity policies, as it did in *PICS*, is currently unknown, but for now the legal framework to analyze these kinds of cases remains the same. The *Fisher* ruling does not necessarily change how courts examine K–12 school policies aimed at increasing diversity, but it may still be advisable for education administrators to reexamine such policies to confirm that race-neutral alternatives are considered and that any plans to employ racial classifications are narrowly tailored to meet a compelling interest.

Conclusion

Racial and ethnic diversity continue to be important factors contributing to the quality of education in both K–12 and higher education settings: “Diversity not only contributes to the achievement of students, it also contributes positively to the development of citizenship traits, transmission of cultural norms, and growth of interpersonal and social skills that students will need to be productive and thriving citizens of a democratic nation” (Brief for The College Board and the National School Boards Association, et al. as Amici Curiae Supporting Respondents, *Fisher v. University of Texas at Austin*, 2013, p. 7; see: <http://www.utexas.edu/vp/irla/Documents/ACR%20College%20Board%20et%20al.pdf>). More-over, limitations placed on race-conscious decision making in university admissions could render public school districts “unwilling to voluntarily explore avenues for diversity in their classrooms that could both diminish the harms of racial isolation and enhance the benefits of diversity for all students” if they know it is useless for their students’ success and benefit in higher education (Brief for The College Board, p. 36). It remains uncertain how the lower court will resolve the strict scrutiny issue on remand because the Supreme Court failed to offer specific guidance. In the meantime, race-conscious admissions policies survive, and while the lower court examines this question, university admissions officers around the country will indeed struggle to narrowly tailor their race-conscious admissions plans.

References

1. Cunningham, C.D., G. C. Loury, and J.D. Skrentny. 2002. Passing strict scrutiny: Using social science to design affirmative action programs. *Georgetown Law Journal* 90: 835.
2. Eckes, S.E., D.K. Nguyen, and J. Ulm. 2013. *Fisher v. University of Texas*: The potential for social science research in race-conscious admissions. *Education Law Reporter* 288: 1.
3. Rotunda, R., and J. Nowak. 2010. *Constitutional law, 8th ed.* New York: West.
4. U.S. Department of Education, Office for Civil Rights. 2011. Guidance on the voluntary use of race to achieve diversity and avoid racial isolation in elementary and secondary schools. <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html>.